



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Application of San Diego Gas & Electric Company (U 902-M), Southern California Edison Company (U338-E), Southern California Gas Company (U 904-G) and Pacific Gas and Electric Company (U 39-M) for Authority to Establish A Wildfire Expense Balancing Account to Record for Future Recovery Wildfire-Related Costs

Application 09-08-020
(Filed August 31, 2009)

**PROTEST
OF THE DIVISION OF RATEPAYER ADVOCATES TO THE
JOINT APPLICATION OF SAN DIEGO GAS & ELECTRIC
COMPANY, SOUTHERN CALIFORNIA GAS COMPANY, AND
PACIFIC GAS AND ELECTRIC COMPANY**

SCOTT LOGAN & DONNA FAY-BOWER
Analysts for the Division of Ratepayer
Advocates
California Public Utilities Commission
505 Van Ness Ave.
San Francisco, CA 94102
sjl@cpuc.ca.gov, dfb@cpuc.ca.gov
Phone: (415) 703-1418
Fax: (415) 703-1529

JACK STODDARD
Attorney for the Division of Ratepayer
Advocates
California Public Utilities Commission
505 Van Ness Ave.
San Francisco, CA 94102
fjs@cpuc.ca.gov
Phone: (415) 531-0174
Fax: (415) 703-2262

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I. INTRODUCTION

Pursuant to Rule 2.6 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure ("Rules"), the Division of Ratepayer Advocates ("DRA") files this protest to Application No. 09-08-020 ("Application" or "A.09-08-020"), which was jointly filed by San Diego Gas & Electric Company ("SDG&E"), Southern California Gas Company ("SoCalGas") (together, "SDG&E/SoCalGas"), Southern California Edison Company ("SCE" or "Edison"), and Pacific Gas and Electric Company ("PG&E") (collectively, "Applicants" or "Utilities" or "IOUs"). In this application, the IOUs assert that they are not able to obtain sufficient or reasonably priced insurance coverage against wildfire related claims and request authority to (1) establish Wildfire Expense Balancing Accounts ("WEBA") to record wildfire related costs, and (2) recover WEBA balances in retail rates. The application raises several areas of concern that warrant further investigation by the Commission. This protest provides a non-exhaustive identification of issues that DRA will examine in

this proceeding. DRA anticipates that some issues may be resolved, and other new issues may arise, as discovery proceeds. DRA expects that hearings may be necessary to resolve the issues raised in the Application. DRA opposes the application unless and until all issues identified below, as well as others that may arise, are satisfactorily addressed.

II. BACKGROUND

On August 31, 2009 the IOUs jointly filed A.09-08-020 requesting the instant relief. The application represents the latest in a series of proceedings where the Commission has addressed wildfire related matters involving the utilities' power lines. Last year the Commission opened a rulemaking proceeding in R.08-11-005 ("OIR") to revise and clarify the safety regulations that apply to electric and telecommunications facilities. Resolving Phase 1 of that proceeding, the Commission recently adopted D.09-08-029 which proscribes new measures to reduce fire hazards for the 2009 fire season, and the Commission is in the process of further examining fire prevention and safety measures in Phase 2 of R.08-11-005. The Commission has also issued Orders Instituting Investigations ("OII"), wherein it is currently conducting investigations into whether SDG&E's failure to comply with General Order ("GO") 95 and section 451 of the California Public Utilities Code caused three of the 2007 fires,¹ and whether SCE's failure to comply with General Order ("GO") 95 and section 45²1 of the California Public Utilities Code caused one of the 2007 fires.

III. ISSUES

A. If WEBA Is Approved It Should Be Capped At Some Specified Amount And Should Be Reviewed By The Commission Within 3 Years.

The Utilities propose that WEBA be established to allow for rate recovery of costs incurred resulting from wildfire related claims "to the same extent that such claims would have been covered by insurance policies the Utilities historically have been able to

¹ I.08-11-006 and I.08-11-007

² I.09-01-018.

purchase.”³ Insurers do not provide open ended coverage for unspecified amounts of liability. Neither should ratepayers be expected to assume an unspecified amount of risk. Historically, the Utilities have been able to purchase between \$650 million and \$1.2 billion of general liability coverage.

In addition, if WEBA is approved it should be reviewed by the Commission within three years. As stated above, the Commission is presently taking steps to address power line fire safety. It is possible that as a result of these new requirements, or as a result of wet winters, insurers will be willing to reenter the market. Accordingly, the Commission should reconsider whether and to what extent WEBA is necessary within 3 years of approval.

B. WEBA Should Not Include Costs Incurred As A Result Of Events That Predate The Filing Of A.09-08-020.

The Utilities argue that establishing WEBA is necessary because of “major changes in the insurance market”.⁴ The changes described in the application include significantly increased premiums and a dramatic reduction in the total amount of wildfire-specific insurance capacity available to the utilities, particularly to SDG&E/SoCalGas and to a much lesser extent to PG&E. In the case of SDG&E/SoCalGas these drastic market changes were fully realized during the course of the 2009 insurance procurement cycle. Since it is the present 2009 insurance market shift that has precipitated the WEBA filing, only costs incurred for events that occur after the filing date should be eligible for recovery through WEBA. No payments for claims made as a result of the 2007 fires, or any other fires occurring prior to August 31, 2009, should be recorded in WEBA, in the event that the application is approved, because the utilities have not claimed why coverage under their pre-existing insurance policies would not be adequate, and their recovery of insurance premiums and expenses, such as legal

³ A.09-08-020, Testimony In Support Of Joint Application For Authority To Establish A Wildfire Expense Balancing Account To Record For Future Recovery Wildfire-Related Costs; August 31, 2009; (“Applicant Testimony”), p. 1

⁴ Applicant Testimony, p. 2.

expenses, were already determined in previous general rate cases. It would violate the rule against retroactive ratemaking for the utilities to seek insurance premiums or claims expenses for prior events.

C. Ratepayers Should Not Pay For Premium Increases That Result From An Insurer’s Negative Assessment Of A Utilities’ Failure To Adequately Maintain Utility Infrastructure.

The Utilities’ argue that “[i]nsurance carriers have dramatically limited coverage in response to claims experience and a negative perception of a legal doctrine known as ‘inverse condemnation,’” which they assert is similar to strict liability.⁵ The Utilities also state that “[w]ildfires are inevitable” and that “like other natural disasters, the magnitude of damage depends on factors outside the Utilities’ control, such as weather, demography, and local fire-fighting capabilities.”⁶ While DRA recognizes that catastrophic wildfires are, to a large degree, “natural” disasters, they are not inevitable in the same way that earthquakes or hurricanes are inevitable. A fire that is caused or exacerbated by utility facilities might, in some instances, have been avoided if the utility had done a better job of preventative maintenance, brush clearing, or taking other steps to mitigate fire risk.⁷ While wildfires are certainly complex events with several and variable contributing factors, the Utilities’ insurers are certainly cognizant of the relationship between the proper maintenance of utility facilities and the incidence of wildfires. It is unclear from the testimony included in the application whether some portion of the increase in premiums could be attributed to an insurers’ negative assessment of the utilities’ maintenance records. DRA objects to having ratepayers pay for any increase in premiums that is due to a utility’s negligent, grossly negligent or reckless conduct in maintaining their facilities, or a failure to comply with GO 95

⁵ Id, p. 1.

⁶ Id.

⁷ As previously discussed, these issues are being examined in the OIR and OIIs.

requirements, or other applicable federal or state rules, regulations or statutory requirements.

D. In Order To Ensure That The Utilities Have The Proper Incentive To Safely Maintain Their System As Well As Defend Against Frivolous Claims, Shareholders Should Be Required To Pay For A Percentage Of All Expenditures Recorded In WEBA.

In the event that WEBA is authorized, shareholders should pay for share some fraction of all recorded expenditures, including deductibles and copayments as well as legal defense expenses. Requiring that shareholders have “some skin in the game” will ensure that Utilities’ have the incentive to safely maintain infrastructure as well as investigate and defend against frivolous claims. As the Commission noted in D.09-09-030, p.50, 97% of all wildfires are caused by events other than power lines. Despite this fact, and because of the Utilities’ capacity to pay claims, people harmed by wildfires may allege that Utility infrastructure is to blame even when it is not.

Presently insurers are at risk for the majority of liability exposure. The insurer, therefore, has both the incentive and the means to investigate claims and defend against claims in court. Where insurance only covers \$399 million or less of a potential \$1.17 billion or more in potential claims, as in the case of SDG&E/SoCalGas⁸, insurers will only provide those services for the relatively small portion of claims for which they are liable. DRA and CPSD have neither the experience nor the resources to investigate and defend against this scale of claims. If utility shareholders are responsible for paying for some portion of the claims, the utility will have sufficient incentive to investigate and defend against frivolous claims the same way an insurer would and to minimize costs of doing so.

⁸ Id, p. 62.

E. The Utilities Should Not Be Permitted To Record Wildfire Related Expenditures Incurred As A Result Of Damages Caused By A Utilities' Gross Negligence, Violation Of A General order, or violation of state or federal law.

The Utilities propose that WEBA should be available for recovery of costs from wildfire claims, “to the same extent that such claims would have been covered by insurance policies the Utilities historically have been able to purchase.”² While the Utilities’ testimony includes the broad definition of “wildfire” that governs at least one of the insurance policies, there is little detail on what other terms and limitations apply to the various tiers of coverage. Regardless of how insurance policies have treated such cases historically, ratepayers should not be expected to pay for claims that arise from a utilities’ negligence, gross negligence, violation of a general order, or violation of state or federal law. Indeed, it would be against public policy for the utility to charge its ratepayers for these types of expenses. Just as a utility must ultimately be responsible for the safety of its hazardous facilities under state law and cannot escape its responsibility by blaming an independent contractor,¹⁰ a utility cannot escape its responsibility and pass all of its expenses to its ratepayers when the utility is culpable because its conduct is negligent, grossly negligent, reckless or violates the Commission’s general orders or other state or federal regulations or statutes. In order to protect ratepayers from unreasonable costs, a utility should be required to prove that a wildfire event for which they seek to recover costs was not caused by negligence, gross negligence, recklessness, or a violation of the Commission’s general order or other state or federal regulations or statutes.

F. All Expenditures Recorded In WEBA Should Be Subject To Reasonableness Review

Each of the Utilities’ proposed WEBA tariffs provide for disposition so that they can recover the costs recorded. Prior to any disposition, all costs recorded should be subject to reasonableness review by the Commission.

² Id., p. 1.

¹⁰ See *Snyder v. Southern Cal. Edison Co.* (1955). 44 Cal.2d 793, 801-802.

SCE, in particular, requests that WEBA balances be disposed via the Energy Resource Recovery Account (ERRA). DRA objects to disposing of WEBA balances through ERRA, which is more properly reserved for the disposition of energy procurement related costs.

G. The Utilities Should Not Be Allowed to Recover Transmission-Related Expenses in Distribution Rates

DRA contests the Utilities' position that FERC-disallowed costs should be recoverable.¹¹ If the costs are allocable to transmission rates, the Utilities should seek their recovery at the FERC, because of the unbundling of rates required by D. 97-08-056, which implemented the statutory requirement in sections 330(k)(1) and 368(b) of the California Public Utilities Code. Whether or not the Utilities seek the transmission-related expenses at the FERC, their transmission-related expenses should not be recovered in its unbundled distribution rates.¹² If the Utilities sought the transmission-related expenses at the FERC and the FERC disallowed the costs, this could be an additional reason for the Commission to reject the expenses, based upon the FERC's decision.

H. Legal costs should not be recorded in WEBA

Litigation expenses are currently recovered as an Administrative & General forecast expense in the GRC. Forecasted amounts are not reserved for any specific purpose and, unlike balancing accounts, can be used for any other expense if not needed for the forecasted purpose. If the Commission approved balancing account treatment for wildfire related litigation expenses, it would create the potential for double recovery by the Utilities. To allow balancing account treatment for litigation expenses for a specific need, when the Commission has already approved a forecasted amount for litigation

¹¹ Applicant Testimony, p. 77

¹²To the extent that the FERC approves the Utilities' transmission-related expenses, they would be rolled into the California Independent System Operator's (CAISO) Transmission Access Charge (TAC), which is paid by all of the Participating Transmission Owners, and then the rolled-in rate would be recoverable as the unbundled transmission component of the Utilities' retail rates.

expenses generally, contravenes the policy of utilizing forecast-based ratemaking. Furthermore allowing recovery of both forecasted litigation expenses through the GRC and recovery of specific wildfire related litigation costs through WEBA would be unjust and unreasonable since there is no parallel mechanism where ratepayers can be credited savings should a utility not need the amount forecast in the GRC.

IV. CATEGORIZATION AND PROPOSED SCHEDULE

DRA supports the proposed categorization of ratesetting. Since there will likely be disputed issues of fact concerning insurance procurement practices and the propriety of the Utilities' requested relief, DRA believes that hearings will be necessary. DRA objects to the proposed expedited schedule, which allows insufficient time for discovery, and proposes that the schedule be set at the pre-hearing conference.

II. CONCLUSION

DRA opposes the application as filed and will assist the Commission in determining the proper disposition. DRA reserves the right to raise other issues as the proceeding develops and in response to discovery.

Respectfully submitted,

/s/ JACK STODDARD

Jack Stoddard
Staff Counsel

Attorney for the Division of Ratepayer
Advocates

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
fjs@cpuc.ca.gov
Phone: (415) 531-0174
Fax: (415) 703-2262

October 5, 2009

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS DAY SERVED A COPY OF **PROTEST OF THE DIVISION OF RATEPAYER ADVOCATES TO THE JOINT APPLICATION OF SAN DIEGO GAS & ELECTRIC COMPANY, SOUTHERN CALIFORNIA GAS COMPANY, AND PACIFIC GAS AND ELECTRIC COMPANY in A. 09-08-020** BY USING THE FOLLOWING SERVICE:

E-Mail Service: sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

U.S. Mail Service: mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on October 5, 2009 at San Francisco, California.

/s/ NANCY SALYER
NANCY SALYER

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

Service List

A0908020

mthorp@sempra.com
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lhj2@pge.com
henry.weissmann@mto.com
execwnp@socal.rr.com
case.admin@sce.com
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